RECORD AND BRIEFS

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No. 16-149

In the Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
fka Group Health Plan, Inc.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF MONTANA, ALABAMA, ALASKA, COLORADO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, NEBRASKA, NEVADA, NEW HAMPSHIRE, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. OPM's Rule Is Not Entitled To *Chevron* Deference Because Congress Did Not Grant OPM The Authority To Make Preemptive Determinations 7

II. The Presumption Against Preemption Applies When Interpreting The Scope Of An Express Preemption Provision 17

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 9, 13, 16

Altria Group Inc. v. Good,
555 U.S. 70 (2008) 17, 18, 21, 22

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 8

Bates v. Dow AgroSciences, LLC,
544 U.S. 431 (2005) 3, 18, 21

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 8, 17, 18, 19, 20

City of Arlington v. FCC,
133 S. Ct. 1863 (2013) 8

Coventry Health Care of Missouri, Inc. v. Nevils,
135 S. Ct. 2886 (2015) 4

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 12

Empire HealthChoice Assurance Inc. v. McVeigh,
547 U.S. 677 (2006) 3, 21, 22

Federal Maritime Commn. v. Seatrain Lines, Inc.,
411 U.S. 726 (1973) 9

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 15, 18

Geier v. American Honda Motor Company, Inc.,
529 U.S. 861 (2000) 15

Gonzales v. Oregon,
546 U.S. 243 (2006) 13

Gregory v. Ashcroft,
501 U.S. 452 (1991) ..... *passim*

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 12

Louisiana Public Service Commn. v. FCC,
476 U.S. 355 (1986) 9

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 18

New York v. FERC,
535 U.S. 1 (2002) 8, 9

Pension Benefit Guaranty Corp. v. LTV Corp.,
496 U.S. 633 (1990) 14

Puerto Rico v. Franklin California Tax-Free Trust,
136 S. Ct. 1938 (2016) 19

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 18

Russello v. United States,
464 U.S. 16 (1983) 13

Smiley v. Citibank (S. Dakota), N.A.,
517 U.S. 735 (1996) 4, 5, 17

Watters v. Wachovia Bank, N.A.,
550 U.S. 1 (2007) 12

Whitfield v. United States,
543 U.S. 209 (2005) 12

Wyeth v. Levine,
555 U.S. 555 (2009) 8, 10, 18

STATUTES AND REGULATIONS

5 C.F.R. § 890.106(h) 4, 7, 9, 16, 17

5 U.S.C. § 8902 2

5 U.S.C. § 8902(m)(1) 2, 9, 21

5 U.S.C. § 8909 2

5 U.S.C. § 8913 2

5 U.S.C. § 8913(a) 13

10 U.S.C. § 1103(a) 11

12 U.S.C. § 25b 11

28 U.S.C. § 1603(b) 12

30 U.S.C. § 1254(g) 10

31 U.S.C. § 313(c), (f) 11

47 U.S.C. § 253(a) 10

47 U.S.C. § 253(d) 10, 16

49 U.S.C. § 5125(d) 10

49 U.S.C. 31141(a) 11

OTHER AUTHORITIES

Nina A. Mendelson, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 Nw. U.L. Rev. 695 (2008) 5, 16, 20

Thomas W. Merrill, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: Preemption and Institutional Choice*, 102 Nw. U.L. Rev. 727 (2008) 14, 15

L. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988) 18

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Ernest A. Young, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: Executive Preemption*, 102 Nw. U.L. Rev. 869 (2008) 14, 15

INTEREST OF THE AMICI CURIAE

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The amici States, as separate sovereigns within the federal system, have important interests in the outcome of this case. As sovereigns, we have the responsibility to enforce our laws to safeguard the welfare of our citizens. In fulfilling this role, and as a matter of federalism, the States have an interest in preserving the appropriate balance between the authority that the federal government exercises and the authority that the States exercise.

Of significant concern to the amici States are cases involving the preemption of state laws by federal agencies. The States recognize that, in some circumstances, agency regulations with the force of law can preempt state law. In our view, however, absent a delegation from Congress, federal agencies are not entitled to deference when they opine, even through notice-and-comment rulemaking, about the preemptive scope of federal law.

While states have representation in Congress, they have no representation in federal agencies. If agencies are allowed to preempt state laws when Congress has not delegated them that authority, then the States' sovereign interests are not protected, the principles of federalism are not honored, and agencies can increase their power by using simple rulemaking to displace state laws. The amici urge this Court to affirm the decision of the Missouri Supreme Court and to hold that federal agencies are not entitled to deference when

they opine about the preemptive scope of federal law, particularly when Congress has not delegated to the agency the authority to preempt state law.

STATEMENT OF THE CASE

The Federal Employee Health Benefits Act (FEHBA) governs health insurance benefits for federal employees. In FEHBA, Congress authorized the Office of Personnel Management (OPM) to manage the program, issue regulations, and contract with insurance carriers to administer FEHBA plans. *See, e.g.*, 5 U.S.C. §§ 8902, 8909, 8913. FEHBA contains an express-preemption clause, which states that contract terms "relat[ing] to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). While FEHBA contains an express-preemption provision, it does not contain a provision expressly authorizing OPM to make preemption determinations.

Respondent Jodie Nevils was a federal employee who was injured in a car accident, and Coventry, or its predecessor, paid for his care. Pet. App. 45a. After Nevils recovered a tort settlement from the third party responsible for the accident, Coventry sought reimbursement and asserted a lien for the amounts it had paid. *Id.* Nevils satisfied the lien and then sued Coventry in state court based on Missouri law, which does not permit the subrogation of tort claims. *Id.*

When the case reached the Missouri Supreme Court, the sole issue concerned whether FEHBA

preempted Missouri's anti-subrogation law. Pet. App. 46a. The Missouri Supreme Court explained that preemption analysis is "informed by two presumptions": "First, it is presumed that the states' historic police powers are not preempted unless it is the clear intent of Congress"; and, second, the scope of a preemption provision depends on Congress's purpose in enacting the statute. Pet. App. 47a-47b. The Court noted that, when interpreting a statute with more than one plausible reading, courts have a "duty to accept the reading that disfavors pre-emption." Pet. App. 47b (quoting *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 449 (2005)).

The Missouri Supreme Court recognized that it was not the first to consider FEHBA's preemption provision. In *Empire HealthChoice Assurance Inc. v. McVeigh*, 547 U.S. 677, 697 (2006), this Court observed that FEHBA's preemption provision was "open to more than one construction." Based on *McVeigh*, the Missouri Court determined that it had the duty to accept a reading that disfavored preemption. Pet. App. 49a. The Court further noted that this Court had distinguished between an insured's insurance coverage and benefits and the insurer's right to subrogation. With these considerations and *McVeigh*'s "cautious" reading of FEHBA's preemption provision, the Missouri Supreme Court determined that FEHBA did not preempt Missouri law barring subrogation. Pet. App. 53a-54a. The court reasoned that the FEHBA contract's subrogation provision did not relate to "coverage and benefits" but only to the insurer's right to reimbursement after benefits have been provided. *Id.*

Coventry petitioned for certiorari. While that petition was pending, OPM adopted a new regulation stating that subrogation and reimbursement under a FEHBA contract "relate to" benefits and that those provisions were "therefore effective notwithstanding any state or local law" or regulation. 5 C.F.R. § 890.106(h). This Court granted certiorari, vacated the Missouri Supreme Court's judgment, and remanded for reconsideration in light of OPM's new rule. *Coventry Health Care of Missouri, Inc. v. Nevils*, 135 S. Ct. 2886 (2015).

On remand, the Missouri Supreme Court reaffirmed its determination that FEHBA did not preempt the state's anti-subrogation law. The Court noted that OPM's rule had done nothing to change the text of FEHBA's preemption provision, and it declined to apply deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to OPM's new rule. Pet. App. 5a. The Court reasoned that, "[w]hile *Chevron* has been applied repeatedly to determine the substantive meaning of a statute, the United States Supreme Court has never held expressly that *Chevron* deference applies to resolve ambiguities in a preemption clause." *Id.* The Court further reasoned that Coventry's contention that it should defer to the OPM rule amounted to a "tacit admission" that Congress had not expressed a "clear and manifest intent" to preempt state anti-subrogation laws. Pet. App. 7a. Given the ambiguity of FEHBA's preemption clause, the Court again applied a presumption against preemption. *Id.*

The Court also found guidance from this Court's decision in *Smiley v. Citibank (S. Dakota), N.A.*, 517

U.S. 735 (1996). There, this Court rejected the argument that an agency rule was not entitled to deference and that the presumption against preemption should apply, stating that the argument confused "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided de novo by the courts." *Smiley*, 517 U.S. at 744. The Missouri Court read *Smiley* as indicating that *Chevron* deference applies to an agency's determinations about substantive provisions but that deference does not extend to provisions "that deal expressly with preemption[.]" Pet. App. 9a. The court thus held that OPM's rule did not change the fact that FEHBA's preemption provision did not "express Congress' clear and manifest intent to preempt Missouri's anti-subrogation law." Pet. App. 13a.

SUMMARY OF THE ARGUMENT

I. For an agency to be entitled to *Chevron* deference, the agency must act within the authority that Congress has delegated to the agency. This basic principle applies to an agency's ability to make preemption determinations. If Congress has not delegated an agency the authority to make preemption determinations, then an agency's attempt to do so—even through a rulemaking process—is invalid, and the agency's preemption determination is not entitled to *Chevron* deference.

In some instances, including in the health insurance context, Congress has expressly delegated to an agency the authority to preempt state law, but it did not do so here. Because Congress did not delegate to OPM the

authority to decide for itself whether FEHBA or OPM's regulations preempt state law, OPM's rule, which attempts to displace state law, is invalid. That OPM enacted its rule following notice-and-comment rulemaking is of no consequence because an agency cannot confer more authority on itself than what Congress has conferred.

A general delegation of rulemaking authority does not authorize an agency to make preemption determinations that are entitled to *Chevron* deference. First, a principal reason given for deferring to agency determinations is that agencies may possess expertise in the areas that they regulate. But agencies possess no special knowledge concerning the sensitive federalism balance at issue in preemption questions. In fact, they are typically indifferent to those concerns. Second, state interests are represented in Congress so state autonomy finds some protection inherent in the political process. Agencies, however, are not designed to represent state interests, and may even be biased in favor of exclusive federal control. In short, allowing an agency to make preemption determinations based on a general delegation of authority threatens to disrupt the delicate balance of dual sovereignty.

II. In cases involving preemption of state law, this Court has adopted a presumption against preemption out of respect for the States as independent sovereigns and to ensure that state laws are not cavalierly displaced. Similarly, when a preemption provision is susceptible to multiple interpretations, this Court has adopted statutory readings that disfavor preemption. While federal laws can preempt state laws under the Supremacy Clause, the States maintain a strong

interest in enforcing all laws that have not been preempted. Thus, the States believe that a presumption against preemption should apply in all preemption cases. A presumption against preemption should certainly apply here because this case involves a preemption provision that this Court has already recognized is susceptible to more than one interpretation. The States ask this Court to reaffirm that, when faced with an ambiguous preemption clause, courts should adopt an interpretation that avoids preemption.

ARGUMENT

I. OPM's Rule Is Not Entitled To *Chevron* Deference Because Congress Did Not Grant OPM The Authority To Make Preemptive Determinations.

A federal agency's assertion that state laws are preempted implicates foundational federalism and separation-of-power concerns. The answer to these concerns is that an agency lacks the authority to declare the preemptive scope of a federal statute unless Congress expressly delegated that power to the agency. Because Congress did not delegate that power to OPM, 5 C.F.R. § 890.106(h) is invalid.

1. The United States Constitution "establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. Under this federal system, the States have sovereign authority concurrent with the federal government's authority. *Id.* This "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the

protection of 'our fundamental liberties'"; the federalist system operates as a check on government abuses of power. *Id.* at 458 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). Further, joint sovereignty provides numerous advantages to the people: "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458.

Under this system, the States retain "substantial" authority as sovereigns, which is limited only by the Supremacy Clause. *Id.* at 457. Under the Supremacy Clause, "state law that conflicts with federal law is without effect" and is preempted. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation and citation omitted). Additionally, this Court has determined that an agency regulation with the force of law can preempt state law. *See Wyeth v. Levine*, 555 U.S. 555, 576 (2009). However, the only authority that an agency has is the authority Congress delegates, and when an agency goes beyond the power that Congress has conferred, the agency's actions are invalid. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (when agencies act improperly or without jurisdiction, their actions are "ultra vires"). This limit on agency authority extends to the preemption context because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U.S. 1, 18

(2002) (quoting *Louisiana Public Service Commn. v. FCC*, 476 U.S. 355, 374 (1986)). Thus, the "question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 133 S. Ct. at 1868 (emphasis in original).

If an agency is acting outside the bounds of its statutory authority, then its actions are not entitled to deference. As this Court has recognized, a "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Further, "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Id.* at 650 (quoting *Federal Maritime Commn. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

2. OPM acted outside its authority when it adopted 5 C.F.R. § 890.106(h). Neither FEHBA's general grant of rulemaking authority to OPM nor its express preemption provision specifically delegate to OPM the authority to determine when FEHBA preempts state law. The preemption provision provides only that contract terms relating to coverage or benefits "shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). This language establishes that contract terms that "relate to" coverage or benefits preempt state law, but it does not go the next step and authorize OPM to itself preempt state law.

And Congress did not separately delegate to OPM the power to determine when FEHBA preempts state laws, either as a matter of conflict preemption or under the preemption provision. The absence of such specific delegation is significant because, while agencies may have "a unique understanding of the statutes they administer," they "have no special authority to pronounce on pre-emption absent delegation by Congress." *Wyeth*, 555 U.S. at 577. And Congress has been clear when it has expressly authorized agencies to preempt state law in other instances. *Wyeth* provided three examples. *See* 555 U.S. at 576 n.9. Regarding telecommunications, Congress expressly authorizes the FCC to make preemption determinations: the FCC "shall preempt the enforcement" of state and local laws if, "after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that" prohibits or has the "effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a), (d). In mining and reclamation, Congress has authorized the Secretary of Interior to "set forth any State law or regulation which is preempted and superseded by the Federal program." 30 U.S.C. § 1254(g). And, in regulating the transportation of hazardous materials, Congress included an express preemption provision and also set forth the process for the Secretary of Transportation to decide whether federal law preempts a state or tribal law. 49 U.S.C. § 5125(d).

But these are not the only examples of congressional delegation of preemption authority. Regarding commercial motor vehicle safety, a "State

may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." 49 U.S.C. § 31141(a). Congress has expressly authorized the Comptroller of the Currency to preempt state consumer financial laws. 12 U.S.C. § 25b ("preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency"). And Congress has provided the Federal Insurance Office express authority "to determine . . . whether State insurance measures are preempted[.]" 31 U.S.C. § 313(c), (f).

Most relevant to this case, Congress has included similar authorizations in the context of health insurance. For example, regarding contracts for military medical and dental care, Congress has expressly delegated to the Secretary of Defense the authority to decide whether state laws are preempted. 10 U.S.C. § 1103(a). That statutory authorization provides that a state law "relating to health insurance, prepaid health plans, or other health care delivery or financing methods shall not apply" to health care contracts entered into by the Secretary of Defense "to the extent that the Secretary of Defense or the administering Secretaries determine that" the state law is inconsistent with a specific contract provision or defense regulation or "to the extent" that the Secretary of Defense determines that "the preemption of the State or local law or regulation is necessary to implement or administer the provisions of the contract or to achieve any other important Federal interest." 10 U.S.C. § 1103(a).

As these provisions show, when Congress intends to authorize an agency to directly preempt state laws, it knows how to do so. It did not do so here, and Congress's decision *not* to expressly authorize OPM to preempt state law should be given great weight. Indeed, this Court has routinely deferred to congressional silence where Congress has expressly spoken on a particular issue in other statutes. *See, e.g.*, *Whitfield v. United States*, 543 U.S. 209, 216-217 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so . . . . Where Congress has chosen *not* to do so, we will not override that choice. . . ."); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so. Various federal statutes refer to direct and indirect ownership. The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules.") (internal citations omitted); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress has demonstrated in . . . other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations."); see also *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38 (2007) (Stevens, J., dissenting) ("To begin with, Congress knows how to authorize executive agencies to pre-empt state laws. It has not done so here.") (Internal footnote omitted).

Similarly, "where Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citations omitted). Although this principle speaks to the "inclusion or exclusion" within a statute, its logic also applies when comparing statutes. When Congress expressly delegates the authority and the process for agencies to make preemption determinations, and then does not include such delegation in other statutes, like FEHBA, this Court should presume that Congress "act[ed] intentionally and purposefully" in not delegating that authority.

3. In arguing to the contrary, Coventry and the United States assert that the general rulemaking authority of 5 U.S.C. § 8913(a) authorizes OPM to use rulemaking to preempt state laws. *See* Pet. Br. at 42; U.S. Br. at 22. But a mere general delegation of authority does "not include the authority to decide the pre-emptive scope of a federal statute." *Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) (citing *Adams Fruit Co.*, 494 U.S. at 649-50). As just discussed, Congress's specific delegation of preemptive power in various other statutes creates a powerful inference that Congress did not wish to delegate that power in statutes—such as FEHBA—which lack such a specific delegation of power.

Many additional reasons support the proposition that a general delegation of rulemaking authority does not authorize an agency to make preemption determinations that are entitled to *Chevron* deference. First, the reasons that courts defer to agency

determination are not present in the preemption context. One of the "principal justifications" underlying *Chevron* deference is an agency's practical expertise. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). But while an agency may possess unique knowledge in the area it regulates, preemption questions necessarily encompass larger questions involving federalism-type values and state autonomy, which are areas where agencies generally lack any expertise. *See e.g.*, Thomas W. Merrill, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: Preemption and Institutional Choice*, 102 Nw. U.L. Rev. 727, 755 (2008) (observing the "critical problem here is one of tunnel vision. Agencies know a great deal about one federal regulatory scheme, . . . But they are unlikely to have much knowledge—or even care—about larger questions concerning the division of authority between the federal government and the states."). Because agencies have no practical "expertise" in these areas, there is no reason that courts should accord them any deference when they make preemption determinations. *See also*, Ernest A. Young, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: Executive Preemption*, 102 Nw. U.L. Rev. 869, 886-89 (2008) (explaining that the usual justifications for *Chevron* deference are problematic or impracticable in the preemption context).

Second, deferring to an agency's preemption determinations when it has no express preemptive authority threatens the autonomy that States possess in our system of dual sovereignty. As this Court has recognized, the political process provides the primary safeguard for protecting state autonomy. *See Gregory*,

501 U.S. at 464 (noting that the "Court in *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers"). States' interests have some protection through their representation in Congress. State autonomy also finds some protection in the inherent inertia present in the legislative enactment process. *See* Young, *Executive Preemption*, 102 Nw. L. Rev. at 876. Federal agency action provides neither of these protections, and agencies can easily sidestep them. As Professor Young correctly notes, agencies "have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction." *Id.* at 878. Justice Stevens similarly observed that, "Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law." *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).

In addition to not representing state interests, there are also the related dangers that an agency will be biased in favor of exclusive federal control and that the agency will be "captured by the firms it regulates." Merrill, *Preemption and Institutional Choice*, 102 Nw. U.L. Rev. at 756. Significantly, allowing an agency to preempt state law under a general delegation of authority "could result in an agency possessing the authority to preempt nearly any relevant state law that makes a policy choice different from that made by the agency." Nina A. Mendelson, *Symposium: Ordering*

State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption, 102 Nw. U.L. Rev. 695, 710 (2008). Congress should not be presumed to have given an agency such sweeping power through a delegation of general rulemaking authority. *Id.* at 716.

The fact that OPM made its preemption determination pursuant to notice-and-comment rulemaking does not change the analysis. While Congress has authorized some agencies to make preemptive determinations after notice-and-comment, *e.g.*, 47 U.S.C. § 253(d), it has not given OPM that authority. An agency cannot "bootstrap" itself into more power than Congress conferred upon it simply by cloaking its actions in the administrative process. *See Adams Fruit Co.*, 494 U.S. at 650.

4. This Court should also reject Coventry's characterization of OPM's rulemaking as simply interpreting a substantive provision. Coventry Br. at 47-50; *also* U.S. Br. at 21-23. Even OPM acknowledged it was making a preemption determination. *See* 5 C.F.R. § 890.106(h). OPM's regulation makes no secret that it intended to declare the preemptive scope of FEHBA; after stating that an insurance carrier's rights to subrogation and reimbursement "relate to" coverage and benefits, OPM stated: "These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." *Id.* The plain language of OPM's rule makes clear that OPM was going far beyond merely interpreting a substantive provision and was instead making a preemption determination.

For similar reasons, Coventry misplaces its reliance on *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). *Smiley* recognized a distinction between an agency's authority to interpret a statute's substantive meaning and an agency's authority to decide whether a statute preempted state law. *Id.* at 744. *Smiley* assumed, albeit without deciding, that whereas agencies could interpret substantive statutory meaning, whether a statute was preemptive was a job for the courts. *Id.* If Coventry's view of *Smiley* is correct, then the distinction between substantive and preemptive regulations that *Smiley* assumed existed is illusory. Agencies can simply announce an "interpretation" of a statute and then declare that, based on its interpretation, its rule is "therefore effective notwithstanding any state or local law, or any regulation issued thereunder[.]" 5 C.F.R. § 890.106(h). If agencies are permitted to confer power upon themselves in this way, then no state law is safe from preemption, regardless of Congress's intent.

II. The Presumption Against Preemption Applies When Interpreting The Scope Of An Express Preemption Provision.

1. Because preemption implicates federalism concerns and the States' sovereign responsibility to ensure the public health and safety of their citizens, this Court has adopted guiding principles to ensure that state laws are not cavalierly preempted. First, Congress's purpose is the "touchstone" in a preemption analysis. *Cipollone*, 505 U.S. at 516; *accord Altria Group Inc. v. Good*, 555 U.S. 70, 76 (2008). Second, this Court assumes that Congress did not intend to preempt state law unless that is Congress's "clear and

manifest purpose." *Cipollone*, 505 U.S. at 516; *accord Altria Group Inc.*, 555 U.S. at 77. Additionally, when an express preemption provision is susceptible to more than one meaning, one that favors preemption and one that disfavors preemption, this Court accepts the meaning that disfavors preemption. *Altria Group Inc.*, 555 U.S. at 77 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

This Court has employed the presumption against preemption for sixty years. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The principle underlying the presumption is the Court's "respect for the States as 'independent sovereigns in our federal system.'" *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Court applies the presumption both out of concern for federalism and the States' historical "primacy" in regulating for health and safety. *Medtronic*, 518 U.S. at 485. The presumption also reflects the principle that "'[t]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.' L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)." *Gregory*, 501 U.S. at 464.

The Court has applied the presumption when addressing either express or implied preemption as well as the scope of preemption. *Altria Group, Inc.*, 555 U.S. at 77; *Medtronic*, 518 U.S. at 485. In light of these precedents, the Missouri Supreme Court properly applied the presumption against preemption to analyze FEHBA's ambiguous preemption clause.

2. Citing *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), Coventry argues that no presumption against preemption should apply when an express preemption clause is at issue and that Congress's preemptive scope should be discerned by focusing solely on the statutory text. *E.g.*, Coventry Br. at 36. That reasoning makes sense only when the preemption clause, as a matter of plain meaning, clearly applies in a given context. After all, if—as in *Franklin California Tax-Free Trust*—it is "clear and manifest" from the statute which state laws Congress intended to preempt, then there may be no need to employ other interpretive tools. But when the provision's language does not clearly resolve whether it applies, the presumption has a critical role to play.

As this Court has recognized, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517. Stated differently, a statute that expresses Congress's "clear and manifest" purpose to preempt some laws equally expresses Congress's "clear and manifest" intent not to preempt others. Given the States' interests in enforcing their police powers and statutes that have not been preempted, a presumption against preemption should apply when determining the scope of an express preemption clause. As Professor Young has noted, "[i]t is unclear why the presumption against preemption should 'dissolve' . . . when we move from the first question to the second—that is, why the same concerns for state autonomy that raise the interpretive bar to find *any* preemption should not also weigh against interpreting the *scope* of preemption too broadly." Ernest A. Young, *Article: "The Ordinary Diet of the*

Law": The Presumption Against Preemption in the Roberts Court, 2011 Sup. Ct. Rev. 253, 272.

No one suggests that the presumption against preemption should apply *instead of* or to the exclusion of the statutory text. But it is wrong to assume that an express preemption clause is at odds with this Court's assumption that Congress does not intend to displace state law unless that is its clear and manifest intent. Rather, the presumption and the statutory text work together. For example, in *Cipollone*, the Court applied the presumption against preemption in conjunction with its interpretation of the statutory text. *See Cipollone*, 505 U.S. at 518, 522-23. Moreover, given that the courts have applied a presumption against preemption for six decades, it is reasonable to assume that Congress enacts legislation, including preemption provisions, with the understanding that courts will apply the presumption and if Congress wishes to make its intentions clear, it can do so. *See* Mendelson, *A Presumption Against Agency Preemption*, 102 N.w. U.L. Rev. at 708 ("Congress drafts legislation against the backdrop of the presumption against preemption, which has been a well-established canon of construction in judicial opinions for several decades. It is reasonable to think that legislative drafters would be aware of and attentive to the operation of such a canon.").

When the text of a preemption clause is ambiguous, Congress's intent is, by definition, not clear. In these instances, statutory text is not enough, and the Court must use other interpretive tools. With an ambiguous preemptive clause, it makes perfect sense to apply a presumption against preemption because the reason for

not applying the presumption—that Congress's intent is clear and manifest—is inapplicable. When the reach of a preemption provision is ambiguous, the presumption against preemption aids courts in drawing the line in a way that honors federalism principles and respects the sovereignty that the States share with the federal government. That is why, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group Inc.*, 555 U.S. at 77 (quoting *Bates*, 544 U.S. at 449).

3. This Court has already decided that FEHBA's preemption clause is ambiguous, and thus, it should interpret it in a manner that disfavors preemption. *Altria Group Inc.*, 555 U.S. at 77. In *McVeigh*, this Court observed that 5 U.S.C. § 8902(m)(1) was "a puzzling measure, open to more than one construction." 547 U.S. at 697. What is more, this Court made that statement in the context of a health insurance contract's reimbursement provision, the same type of provision at issue here. The Court noted that the reimbursement provision could be interpreted as a contract term that related to "coverage or benefits," in which case the provision would fall within the scope of FEHBA's preemption clause. *Id.* However, because a reimbursement claim typically comes "long after 'coverage' and 'benefits' questions have been resolved," the preemption provision could also be read as referring to the beneficiary's right to payment under the plan and not to the carrier's right to reimbursement. *Id.* The Court did not have to "choose between those plausible constructions" to decide the issue in *McVeigh*, but the highlighted ambiguity exists nonetheless. *Id.*

In light of this Court's discussion in *McVeigh*, Coventry's assertion that FEHBA's preemption "statute speaks clearly" is mystifying. *See* Coventry Br. at 39. This Court has already said that the statute is "open to more than one construction," *McVeigh*, 547 U.S. at 697, and thus, it does not speak clearly. Coventry tries to fight this obvious conclusion by characterizing the Court's discussion as "dictum" and pointing out that the holding regarding jurisdiction was decided "[o]ver the dissent of four justices." Coventry Br. at 39-40. First, a decision "over the dissent of four justices" is a majority opinion and it is entitled to the same weight as any other majority opinion. Second, whether the majority's determination was dictum or not does not change that the Court found FEHBA's preemption provision ambiguous.

Because FEHBA's preemption provision is susceptible to more than one interpretation, courts should interpret FEHBA's preemption clause in a way that disfavors preemption. *Altria Group Inc.*, 555 U.S. at 77. The statute, properly construed, does not preempt Missouri's anti-subrogation law; and, as shown in § I, *supra*, OPM lacked the authority to adopt a rule saying otherwise. The Missouri Supreme Court was therefore correct both times it addressed this case.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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